

ESTTA Tracking number: **ESTTA388942**

Filing date: **01/18/2011**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Luberski, Inc. dba Hidden Villa Ranch
Granted to Date of previous extension	01/19/2011
Address	310 N. Harbor Blvd., Suite 205 Fullerton, CA 92832 UNITED STATES
Attorney information	Darryl J. Horowitz, Esq. Coleman & Horowitz, LLP 499 W. Shaw Ave., Suite 116 Fresno, CA 93704 UNITED STATES dhorowitz@ch-law.com Phone:559-248-4820

Applicant Information

Application No	77893578	Publication date	09/21/2010
Opposition Filing Date	01/18/2011	Opposition Period Ends	01/19/2011
Applicant	Lopez, Juan Pablo 318 Indian Trace, Suite 219 Weston, FL 33326 UNITED STATES		

Goods/Services Affected by Opposition


Class 029. First Use: 2001/07/20 First Use In Commerce: 2001/07/20
All goods and services in the class are opposed, namely: Fruit purees

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
The mark is merely descriptive	Trademark Act section 2(e)(1)
Dilution	Trademark Act section 43(c)

Marks Cited by Opposer as Basis for Opposition

U.S. Application No.	85108632	Application Date	08/16/2010
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	NEST FRESH		

Design Mark	
Description of Mark	NONE
Goods/Services	Class 029. First use: First Use: 1992/05/01 First Use In Commerce: 1997/07/01 shell eggs and liquid eggs

U.S. Application/Registration No.	NONE	Application Date	NONE
Registration Date	NONE		
Word Mark	Nest Fresh Eggs		
Goods/Services	eggs, shells eggs, and liquid eggs		

Attachments	85108632#TMSN.jpeg (1 page)(bytes) Opposition(2).pdf (8 pages)(55104 bytes) Exhibit A to Opposition.pdf (3 pages)(104459 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by USPS Express Mail Post Office to Addressee on this date.

Signature	/Darryl J. Horowitz/
Name	Darryl J. Horowitz, Esq.
Date	01/18/2011

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

LUBERSKI, INC., a California corporation and)	
doing business as HIDDEN VILLA RANCH,)	
)	
Opposer,)	Opposition No. _____
)	Serial No. 77893578
v.)	Mark: DEFRESCURA
)	Publication Date: September 21, 2010
JUAN PABLO LOPEZ, an individual,)	
)	
Applicant.)	
_____)	

NOTICE OF OPPOSITION

Opposer, LUBERSKI, INC., a California corporation and doing business as HIDDEN VILLA RANCH (“HVR”), believes that it will be damaged by the registration of the mark DEFRESCURA, Application Serial Number 77893578, which was published for opposition on September 21, 2010, and, by and through its attorneys, hereby opposes the registration on the following grounds.

THE PARTIES

1. Opposer, HVR, is a corporation, duly organized under the laws of the State of California, with a principal place of business in the City of Fullerton, State of California.
2. On or about October 2, 2006, HVR purchased the trade names *Nest Fresh Eggs*, *Colorado Natural Eggs*, and *Cyd’s Nest Fresh Eggs* from Nest Fresh Eggs, Inc., a Colorado corporation. All these names were used in connection with the sale of eggs.
3. In addition to the trade names above, HVR purchased the trademark *Nest Fresh*.

This mark was registered with the USPTO on June 12, 2001, Registration No. 2,459,654 for shell eggs. This trademark was first used on or about May 1, 1992, and first used in commerce on or about July 1, 1997. The registration was cancelled in 2008 because HVR inadvertently failed to file a Section 8 Statement of Use. However, HVR has not abandoned the use of this mark and has since applied to re-register the mark *Nest Fresh* in Class 29 for shell eggs and liquid eggs. This application has been assigned Serial No. 85108632 and is pending.

4. In January 2006, HVR also began using the mark *Nest Fresh Always 100% Cage Free*. On or about August 17, 2010, HVR filed a trademark application for registration for this mark. This application has been assigned Serial No. 85108814 and is pending.

5. The mark *Cyd's Nest Fresh* has been used for several years throughout the United States, but as of late 2010, HVR no longer uses "Cyd" as part of the mark.

6. Each of the aforementioned marks is used in connection with eggs, shell eggs, and liquid eggs.

7. HVR continues to use its marks *Nest Fresh*, *Nest Fresh Eggs*, and *Nest Fresh Always 100% Cage Free* throughout the United States for its products. Due to HVR's and its predecessors' exclusive and continued use of the *Nest Fresh* and *Nest Fresh Eggs* marks (collectively referred to as the "NEST FRESH MARKS"), for nearly eighteen (18) years, in connection with eggs, HVR's NEST FRESH MARKS have become distinctive as applied to such goods by reason of substantially exclusive use and continued use by HVR and its predecessors. The NEST FRESH MARKS have long been associated with HVR's and its predecessors' products.

8. HVR is engaged in the trade, marketing, advertising, sale, and promotion of its

products throughout the United States. HVR's NEST FRESH MARKS are used in national publications and advertisements in association with HVR's goods. HVR's products are sold across the country in states such as Florida, Wyoming, Colorado, California, and New Mexico and sold in stores such as Whole Foods Markets, Costco, and Albertsons.

9. Applicant, JUAN PABLO LOPEZ ("LOPEZ"), is an individual located in Weston, Florida. LOPEZ applied to register the mark *DEFRESCURA*.

PROCEDURAL HISTORY

10. LOPEZ applied to register the mark *DEFRESCURA* on December 15, 2009, in International Class 029 for fruit purees. The application was assigned Serial No. 77893578. LOPEZ claims he has used this mark since July 20, 2001, and first used this mark in commerce regulated by the United States as early as July 20, 2001.

11. LOPEZ claims only a standard character mark for the mark *DEFRESCURA*. On March 16, 2010, the USPTO examiner issued an Office Action requesting LOPEZ to provide an English translation of the mark. In response to this request, LOPEZ stated that the English translation of the mark is "Freshness." The USPTO examiner suggested that LOPEZ use the translation statement "of freshness." LOPEZ amended the application to include the English translation of the mark *DEFRESCURA* as "of freshness."

12. On or about September 21, 2010, LOPEZ's mark was published for opposition.

13. On or about October 8, 2010, HVR sent a cease and desist letter to LOPEZ notifying it of the potential infringement of its use of the mark. A copy of this letter is attached hereto as Exhibit "A."

14. HVR believes that it will be damaged by the registration of LOPEZ's mark when

used in commerce with the class of goods applied for and it is likely to cause confusion, or to cause mistake, or deceive others as to HVR's NEST FRESH MARKS for the same or similar goods.

15. Due to HVR's and its predecessors' long and continued use of the NEST FRESH MARKS, HVR's NEST FRESH MARKS will be damaged or diminished by the registration of LOPEZ's mark.

16. LOPEZ's mark is merely descriptive and is not subject to trademark registration and is similarly confusing to HVR's NEST FRESH MARKS. Further, HVR's use of its marks predates any use by LOPEZ of his mark, and his mark will cause dilution of HVR's marks. Therefore, LOPEZ's application for registration should be denied.

FIRST GROUND FOR OPPOSITION

17. HVR incorporates paragraphs 1 through 16 as though fully set forth herein.

18. LOPEZ's mark, as used in connection with goods, is merely descriptive pursuant to 15 U.S.C. § 1052(e).

19. LOPEZ's mark merely signifies the description of the goods, namely, fruit purees, and is not unique or fanciful. Simply using a Spanish translation of the mark does not give the mark distinctiveness or any unique meaning that would give the mark trademark protection. Further, LOPEZ has not asserted distinctiveness or that the mark has acquired a secondary meaning. For this reason, LOPEZ's application for registration should be refused.

SECOND GROUND FOR OPPOSITION

20. HVR incorporates paragraphs 1 through 19 as though fully set forth herein.

21. LOPEZ's mark closely resembles and incorporates HVR's NEST FRESH

MARKS and is used in the same Class of Goods. The marks at issue have the same meaning: Fresh. The overall impression of the NEST FRESH marks connotes freshness and/or products that are fresh. As such, the marks are similar in meaning and overall impression.

22. Further, HVR's products fall within the logical zone of expansion. Though HVR's NEST FRESH marks are used with shell eggs and liquid eggs, HVR's products line logically expands into the area of other goods such as fruit, vegetables, fruit purees, fruit juices, and other items within Class 29 and potentially other classes. HVR and LOPEZ also target the same consumers and trade channels. Registration of LOPEZ's mark therefore will likely cause confusion, mistake, or deceit within the meaning of 15 U.S.C. § 1052(d). Based on the foregoing, LOPEZ's registration should be refused.

THIRD GROUND FOR OPPOSITION

23. HVR incorporates paragraphs 1 through 22 as though fully set forth herein.

24. As set forth above, HVR and its predecessors have used the NEST FRESH MARKS exclusively and continuously as early as 1992. The mark NEST FRESH was registered in 2001 and continues to be used throughout the country. HVR's and its predecessors' products have long been associated with the NEST FRESH MARKS. HVR and its predecessors have achieved distinctiveness and renown for the NEST FRESH MARKS through extensive advertising, excessive sale of its products for almost two decades, and have been long recognized as one of the leading distributors of eggs and various egg products under their NEST FRESH MARKS. HVR's NEST FRESH MARKS are distinctive and nationally known and have been renowned prior to LOPEZ's use of his mark.

25. The goods in which the marks are connected are the same or substantially related.

Both parties conduct business in competing markets and the registration of LOPEZ's mark will therefore cause confusion or deceive consumers and likely dilute HVR's NEST FRESH MARKS.

26. Registration of LOPEZ's pending mark is likely to dilute the distinctive quality or blur the distinctiveness of HVR's NEST FRESH MARKS pursuant to 15 U.S.C. §1125(c).

WHEREFORE, HVR prays for relief as follows:

1. The Board sustain HVR's opposition;
2. The registration of LOPEZ's application for the mark, DEFRESCURA, Serial No. 77893578, be refused; and
3. For such other relief that the Board may deem just and proper.

Respectfully submitted,

Dated: January 18, 2011

By: /Darryl J. Horowitz/
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*Attorneys for Luberski, Inc., a
California Corporation and dba
Hidden Villa Ranch*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Notice of Opposition to Application Serial No. 77893578, in re: Luberski, Inc., a California corporation and doing business as Hidden Villa Ranch, was forwarded by U.S. Express Mail by depositing the same with the U.S. Postal Service on this 18th day of January, 2011, to the attorney for Applicant at the following address:

Eduardo E. Dieppa, Esq.
Dieppa Law Firm, P.A.
2095 W. 76th Street
Hialeah, Florida 33016
edieppa@dieppalaw.com

/Christine English/
CHRISTINE ENGLISH

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that this Notice of Opposition to registration of the mark in Application, Serial No. 77893578 is being filed electronically today, January 18, 2011, on the Electronic System for Trademark Trials and Appeals for the United States Patent and Trademark Office.

/Darryl J. Horowitz/
DARRYL J. HOROWITT

EXHIBIT “A”

Luberski, Inc. doing business as Hidden Villa Ranch v. Juan Pablo Lopez

Submitted by Luberski, Inc. doing business as Hidden Villa Ranch

Opposition to Registration of Serial No. 77893578

COLEMAN & HOROWITT, LLP
ATTORNEYS AT LAW

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October 8, 2010

Via U.S. Mail and E-Mail

Eduardo E. Dieppa, Esq.
Dieppa Law Firm, P.A.
2095 W. 76th Street
Hialeah, FL 33016

Re: **Cease and Desist Use of Pending Mark**
Trademarks: "Defrescura"
App. Serial No.: 77893578
Our Client: Luberski, Inc., dba Hidden Villa Ranch

Dear Mr. Dieppa:

Our office represents Luberski, Inc. dba Hidden Villa Ranch ("HVR"). HVR is the owner of the mark "Nest Fresh." We are writing to ask your client to cease and desist use of the mark "Defrescura."

HVR applied for the mark, "Nest Fresh" in the International Class 029 for "eggs and liquid eggs." (Serial No. 85108632.) The mark "Nest Fresh" has been in use since May 1, 1992, and was first used in commerce in July 1, 1997. As such, our client has superior rights in this mark.

Mr. Juan Pablo Lopez filed a trademark application for Defrescura on December 15, 2009, alleging first use of the mark and first use in commerce as early as July 20, 2001. Defrescura is associated with International Class 029: fruit purees, which is in the same International Class of Goods 029, in relation to the goods and services, "shell eggs and liquid eggs."

Further, the English translation of Defrescura is "Of Freshness," which is similarly confusing to HVR's mark "Nest Fresh." Lastly, both marks use similar trade channels and similar purchasers only adding to the likelihood of confusion. Your client's pending mark was published for opposition on September 21, 2010.

COLEMAN & HOROWITT, LLP
ATTORNEYS AT LAW

Eduardo E. Dieppa, Esq.
October 8, 2010
Page 2

Due to the similarity of our client's mark and your client's pending mark, and the same class of the goods in which the marks are used, your client's pending marks infringes on our client's mark "Nest Fresh."

Before our client goes through the expense of formally opposing your client's application and seeking injunctive relief and damages for the use of our client's mark, we are writing to demand that your client cease and desist use of your client's mark, Defrescura. Please confirm that your client will do so within ten (10) days of the date of this letter. If we do not receive a response from you or your client within that time, we will assume that your client is not willing to cease the use of the proposed mark and we will have no other option than to oppose the application and further take legal action to enforce our client's rights. We thus look forward to your client's timely reply.

Thank you in advance for your prompt attention to this matter. Of course, if you have any questions, please call.

Very truly yours,

COLEMAN & HOROWITT, LLP

Darryl J. Horowitz

DARRYL J. HOROWITT

DJH\heo

cc: Client
Helen E. Omapas